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Duties and Responsibilities of Lawyers in Light of In re Myers: Are You Aware

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Eibling: Duties and Responsibilities of Lawyers in Light of *In re Myers*: A
**DUTIES AND RESPONSIBILITIES OF LAWYERS IN
LIGHT OF *IN RE MYERS*:
ARE YOU AWARE?**

I. INTRODUCTION

Why do lawyer jokes inundate society and popular culture? It is apparent that the authors of such jokes do not understand the ethical mandates the legal profession imposes on itself. From law school forward, lawyers are held to the highest standards of ethical behavior. The Supreme Court of South Carolina has imposed ethical requirements on all lawyers practicing within the state. Law students are *required* to take an ethics course in order to graduate, and are *required* to pass an ethics component of the bar examination. After passing the bar examination, lawyers are *required* to take an oath swearing to uphold these ethical obligations. Throughout their careers in South Carolina, lawyers are *required* to attend continuing legal education seminars to stay current on the law and professionalism issues.

Along with medicine and the clergy, law is one of the world's learned professions.¹ A variety of characteristics set a profession apart from other occupations.² In defining the term profession, Dean Roscoe Pound of Harvard Law School said: "[Profession] refers to a group . . . pursuing a learned art as a common calling in the spirit of a public service"³ Although written in 1953, this definition has great significance today. "The practice of law 'in the spirit of a public service' ought to be the hallmark of the legal profession."⁴

Since the early 1900s, the legal profession has had some foundational code for attorney conduct.⁵ In fact, any occupational group classified as a professional group must enact a code of ethics.⁶ "Codes can be found among such . . . occupations as lawyers, physicians, psychologists, accountants, and landscape architects."⁷ It is through the implementation of these codes, whether their purpose is education, reinforcement, deterrence, or some combination of the three, that a profession can establish a model framework for each of its members.⁸

1. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 14 (1986).

2. *Id.* at 14–16.

3. JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 686 (2003) (quoting DEAN R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)).

4. *Id.* at 687.

5. For a detailed discussion about the drafting, adoption, and successfulness of the 1908 ABA Canons of Ethics, the 1969 ABA Code of Professional Responsibility, and the 1983 ABA Model Rules of Professional Conduct, see WOLFRAM, *supra* note 1, at 53–63.

6. WOLFRAM, *supra* note 1, at 48.

7. *Id.*

8. *Id.* (footnote omitted).

In order to aid the legal profession in fulfilling its ethical obligations, the American Bar Association (ABA) has promulgated the Model Rules of Professional Conduct (Model Rules).⁹ The Model Rules are intended for use by states as a guide for implementing similar rules to maintain ethical behavior. South Carolina has adopted rules substantially identical to the ABA Model Rules.

This Note focuses on (1) the responsibilities and duties of lawyers in South Carolina as expressed by the South Carolina Rules of Professional Conduct (SCRPC) Rule 5.1; (2) the application of this Rule in the recent decision of *In re Myers*,¹⁰ and (3) this decision's impact on the state's legal community. Section II provides an overview of both the Model Rule 5.1 and South Carolina's Rule 5.1. Section III focuses on the practical implication of South Carolina Rule 5.1 in light of *In re Myers*. Finally, section IV provides a conclusion of these issues.

II. OVERVIEW OF RULE 5.1

A. Brief History

Since the early 1960s, law firms have grown in size, and the lawyers in those firms have focused more heavily on specialized areas of law.¹¹ As a result, most firms have moved away from assembling as general partnerships and instead are organizing as professional entities. In these forms, which include professional corporations (PC), limited liability companies (LLC), and limited liability partnerships (LLP), owners are not individually liable for the obligations of the firm.¹² However, practicing in a PC, LLC, or LLP does not alter an individual's ethical obligations.¹³ Under each business form, the law "still holds the entity responsible for the misconduct of its members but protects individual partners from being held personally accountable for another partner's wrongful or negligent acts."¹⁴

South Carolina has adopted separate statutes for PCs, LLPs, and LLCs.¹⁵ In all three arrangements, lawyers are still held personally responsible for their own

9. DZIENKOWSKI, *supra* note 3, at 5–156.

10. 355 S.C. 1, 584 S.E.2d 357 (2003).

11. Robert R. Keatinge, *The Floggings Will Continue Until Morale Improves: The Supervising Attorney and His or Her Firm*, 39 S. TEX. L. REV. 279, 280 (1998).

12. *Id.* at 280–81.

13. ABA/BNA, *LAWYERS' MANUAL ON PROF'L CONDUCT* 91:301, 91:351 (2003) [hereinafter *LAWYERS' MANUAL ON PROF'L CONDUCT*].

14. *Id.* at 91:351. See also *id.* 91:301 (stating "[t]he professional corporation will itself be liable for acts of members and other agents within the scope of their actual or apparent authority.").

15. See S.C. CODE ANN. § 33-19-101 to -700 (PCs); § 33-41-1110 to -1220 (LLPs); § 33-44-101 to -1201 (LLCs) (Law. Co-op. 1976).

conduct.¹⁶ Moreover, precedent indicates that South Carolina attorneys are not held “vicariously liable” for the ethical violations of other attorneys.¹⁷ However, the South Carolina PC, LLP, and LLC statutes “provide that the *entity* is liable for the actions of an employee, partner, or member that are authorized or committed in the scope of the employee’s, partner’s or member’s employment.”¹⁸

With the advent of new structures for law firms, it was imperative for the ethical rules to reflect these changes. In 1977, the ABA appointed a committee to redraft the Code.¹⁹ Rather than merely redraft the Code, this committee created a new product: the Model Rules of Professional Conduct (Model Rules).²⁰ On August 2, 1983, the ABA House of Delegates adopted the Model Rules.²¹

To counterbalance the effect of restructuring on the individual lawyer’s liability for misconduct of others (specifically the elimination of vicarious liability), Model Rule 5.1 set forth the responsibilities of partners, managers, and supervisory lawyers in the new-firm context.²² Moreover, “the intent of Model Rule 5.1 was to establish the principle of supervisory responsibility in the disciplinary context without introducing the concept of vicarious liability.”²³

A majority of states have already adopted some version of the Model Rules.²⁴ With a few additions and modifications, South Carolina adopted the Model Rules,

16. See S.C. CODE ANN. § 33-19-340(a) (PC); § 33-41-370(D) (LLP); § 33-44-303 and comment (LLC) (Law. Co-op. 1976).

17. SUSAN BATTEN LIPSCOMB & SUSAN TAYLOR WALL, 1 S.C. JUR. *Attorney and Client* § 78 (2003) (citing *In re Anonymous*, 346 S.C. 177, 552 S.E.2d 10 (2001)).

18. ROBERT M. WILCOX & NATHAN M. CRYSTAL, ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT 19 (2000) (discussing S.C. CODE ANN. §§ 33-19-340(b) (PC), 33-41-350 (LLP), 33-44-302 (LLC) (Law. Co-op. 1976)) (emphasis added).

19. WOLFRAM, *supra* note 1, at 60–61.

20. See *id.* at 60–63 (discussing the background and adoption of the 1983 Model Rules).

21. ABA, COMPENDIUM OF PROF’L RESPONSIBILITY: RULES AND STANDARDS 1 (2003).

22. See DZIENKOWSKI, *supra* note 3, at 118–20. In 1997, the ABA formed the Ethics 2000 Commission (E2K) on the Evaluation of the Rules of Professional Conduct to update the Model Rules in light of developments in the law and legal profession. The ABA House of Delegates adopted a majority of the amendments proposed by the E2K Commission in February 2002. *Id.* at 5. See also ABA CTR. FOR PROF’L RESPONSIBILITY, *Ethics 2000 - February 2002 Report*, available at http://www.abanet.org/cpr/e2k-202report_summ.html (last visited Mar. 9, 2004) (discussing the incorporation of the changes proposed by the Ethics 2000 Commission during the February 2002 ABA Midyear Meeting in Philadelphia).

23. LAWYERS’ MANUAL ON PROF’L CONDUCT, *supra* note 13, at 91:105 (citing ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–1998*, at 229 (1999)).

24. California, Iowa, Maine, Nebraska, New York, Ohio, and Oregon have not yet adopted any version of the Model Rules. ABA CTR. FOR PROF’L RESPONSIBILITY, *Dates of Adoption of the Model Rules of Professional Conduct*, at http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Mar. 5, 2003).

known as the South Carolina Rules of Professional Conduct, on September 1, 1990.²⁵

B. South Carolina Rules of Professional Conduct

South Carolina Rule 5.1 is analogous to the 2001 version of the Model Rules.²⁶ In fact, the Supreme Court of South Carolina has acknowledged that “South Carolina has had since 1990 a stronger ‘duty to supervise’ rule than many states.”²⁷ Moreover, the supreme court has made it clear in recent decisions that the state will not tolerate “duty to supervise” ethical violations.²⁸

In re Myers is the supreme court’s most recent decision regarding the duties imposed by Rule 5.1.²⁹ The case involved Donald V. Myers, the Solicitor for the Eleventh Judicial Circuit, and his supervision of Assistant Solicitor Francis A. Humphries.³⁰ Simultaneously, Humphries was involved in a separate disciplinary matter before the supreme court for his handling of a murder investigation.³¹

In May of 1995, Humphries, in his capacity as Assistant Solicitor, was called to the Lexington County Sheriff’s Department and advised that a murder suspect, Robert J. Quattlebaum, was being questioned in the presence of his attorney, John E. Duncan.³²

As Humphries entered the polygraph examiner’s office, he discovered Sheriff’s Department personnel looking at a video monitor connected to a surveillance camera in the polygraph room.³³ Humphries realized that they were watching and listening to attorney-client privileged communication between Duncan and Quattlebaum in the polygraph room.³⁴ He testified that he instructed “Sheriff’s Department personnel present to turn off the video monitor.”³⁵ However, he left the room without verifying that the personnel had in fact turned off the monitor.³⁶ Moreover, Humphries did not inform Duncan that his conversation with

25. *Id.*; WILCOX & CRYSTAL, *supra* note 18, at 1.

26. S.C. APP. CT. R. 407, R. 5.1.

27. *In re Myers*, 355 S.C. 1, 14, 584 S.E.2d 357, 364 (2003).

28. *See In re Humphries*, 354 S.C. 567, 582 S.E.2d 728 (2003); *Myers*, 355 S.C. 1, 584 S.E.2d 357; *In re Anonymous*, 346 S.C. 177, 552 S.E.2d 10 (2001).

29. *Myers*, 355 S.C. 1, 584 S.E.2d 357.

30. *See id.* at 4–5, 584 S.E.2d at 357–59.

31. *See Humphries*, 354 S.C. at 567, 582 S.E.2d at 728.

32. *See id.* at 569, 582 S.E.2d at 728.

33. *Id.*

34. *Id.* at 569, 582 S.E.2d at 729.

35. *Id.*

36. *Id.* at 570, 582 S.E.2d at 729 (“Although [Humphries] believed the monitor was turned off, he did not verify that such action had been taken, nor did he ask Lieutenant Phillips to ensure that the monitor had been turned off.”).

Quattlebaum was overheard.³⁷ Shortly thereafter, Quattlebaum emerged from the room and was arrested.³⁸

Approximately one week later, Humphries informed Solicitor Myers of the events that had taken place in the polygraph examiner's office.³⁹ Nonetheless, Myers did not instruct Humphries to tell defense counsel about the eavesdropped conversation at that time.⁴⁰ Humphries testified that in March of 1996 he was notified that a videotape of the privileged conversation might exist.⁴¹ When Humphries informed Myers of this rumored videotape, Myers instructed Humphries that if there were a tape, he should "give it to the defense."⁴² However, Humphries did not attempt to validate the videotape rumor nor did he notify opposing counsel of its potential existence.⁴³ In fact, Humphries did not turn over the videotape until a second discovery request expressly mentioned "videotape or audiotape" recordings.⁴⁴ This was the first time—twenty-seven months after the incident—that defense counsel had been given any information regarding the eavesdropped conversation or the videotape.⁴⁵

At Quattlebaum's trial, defense counsel "moved for the recusal of Humphries and the Eleventh Circuit Solicitor's Office as prosecutors because of the surreptitious intrusion upon the confidential conversation between Quattlebaum and Duncan," but the trial judge denied the motion.⁴⁶ "[Quattlebaum] was convicted of murder, first degree burglary, armed robbery, assault and battery with intent to kill, and possession of a firearm during the commission of a violent crime. [Quattlebaum] was [then] sentenced to death."⁴⁷

On appeal, the Supreme Court of South Carolina found that "the Eleventh Circuit Solicitor's Office had committed deliberate prosecutorial misconduct."⁴⁸ Not only was Quattlebaum's conviction overturned and the Eleventh Circuit Solicitor's Office disqualified, but both Humphries and Myers were subject to

37. *In re Humphries*, 354 S.C. 567, 570, 582 S.E.2d 728, 729 (2003).

38. *Id.*

39. *In re Myers*, 355 S.C. 1, 5, 584 S.E.2d 357, 359 (2003). *Cf. Humphries*, 354 S.C. at 570, 582 S.E.2d at 729 ("Within a day or so, [Humphries] notified Solicitor Donald V. Meyers [sic], of the events which took place at the Sheriff's Department.").

40. *Myers*, 355 S.C. at 5, 584 S.E.2d at 359.

41. *Humphries*, 354 S.C. at 570, 582 S.E.2d at 729. *But see* *State v. Quattlebaum*, 338 S.C. 441, 444, 527 S.E.2d 105, 106 (2000) ("Several of the detectives present testified at [Quattlebaum]'s trial that when one of the detectives asked the deputy solicitor, 'Can we use this [tape]?', the deputy solicitor replied, 'I'm not sure, but if we do, it will be an interesting Supreme Court case.'").

42. *Myers*, 355 S.C. at 6, 584 S.E.2d at 359.

43. *Humphries*, 354 S.C. at 571, 582 S.E.2d at 729; *Myers*, 355 S.C. at 6, 584 S.E.2d at 359.

44. *Humphries*, 354 S.C. at 571–72, 582 S.E.2d at 730; *Myers*, 355 S.C. at 6, 584 S.E.2d at 359.

45. *Humphries*, 354 S.C. at 572, 582 S.E.2d at 730; *Myers*, 355 S.C. at 6, 584 S.E.2d at 359.

46. *Myers*, 355 S.C. at 6, 584 S.E.2d at 360.

47. *State v. Quattlebaum*, 338 S.C. 441, 444, 527 S.E.2d 105, 106 (2000).

48. *Myers*, 355 S.C. at 7, 584 S.E.2d at 360.

attorney disciplinary proceedings and sanctioned for their misconduct. Humphries was suspended from the practice of law for one year for his violations of Rule 5 of the South Carolina Rules of Criminal Procedure and numerous provisions of the SCRPC.⁴⁹ Myers was privately reprimanded in a public opinion for his violation of SCRPC Rules 5.1(b) and (c).⁵⁰

Because the supreme court expressly stated in *In re Myers* that Rule 5.1(a) applies to government agencies, many attorneys in the public sector should reevaluate office policies to ensure current measures meet the “reasonableness” standard of Rule 5.1. Moreover, attorneys in the private sector need to reexamine their roles in their firms to determine respective responsibilities under the SCRPC.

C. Requirements of Rule 5.1

In general, “Rule 5.1 governs the responsibilities of partners and lawyers who, directly or indirectly, supervise other lawyers.”⁵¹ To this end, Rule 5.1 imposes two types of duties: (1) preventive and (2) corrective.⁵² Corrective duties are similar for

49. *Humphries*, 354 S.C. at 572-74, 582 S.E.2d at 730-31. South Carolina Rule of Criminal Procedure 5(a)(1) deals with the required disclosure of evidence by the prosecution in criminal cases and states, in relevant part, that the information subject to disclosure is as follows:

(A) Statement of Defendant. . . any relevant written or recorded statements made by the defendant . . . within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution . . .

....

(C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy . . . *photographs*, . . . which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense . . .

S.C. R. CRIM. P. 5(a)(1) (emphasis added).

Humphries was obligated under this rule to inform defense counsel about the eavesdropped conversation between Quattlebaum and his attorney, to notify defense counsel about the possible existence of the videotape, to diligently attempt to verify that such videotape existed, and to turn over the videotape to defense counsel upon request for “photographs.” *Humphries*, 354 S.C. at 572-73, 582 S.E.2d at 730.

50. *Myers*, 355 S.C. at 14-15, 584 S.E.2d at 363-64. Before Myers’ disciplinary matter reached the supreme court, the Commission on Lawyer Conduct (“Panel”) investigated the matter and determined that Myers had violated SCRPC Rule 5.1(b), but dismissed the charge that he violated SCRPC Rule 5.1(c). Upon these findings, the Panel submitted a recommendation of public reprimand to the supreme court. Although the supreme court gives great deference to such a recommendation, the court may exercise *de novo* review of findings of fact and conclusions of law. *Id.* at 7, 584 S.E.2d at 360.

51. *In re Anonymous*, 346 S.C. 177, 182, 552 S.E.2d 10, 12 (2001).

52. See Stephen Gillers, *Preventive Ethics*, in LEGAL ETHICS: EVERYTHING A LAWYER NEEDS TO KNOW AND SHOULD NOT BE AFRAID TO ASK at 175, 185 (PLI Litig. & Admin. Practice Course, Handbook Series No. 348, 1988).

both partners and supervisory lawyers. However, preventive duties impose slightly different requirements on partners and supervisory lawyers.

This Note focuses on the preventive duty imposed on partners and supervisory attorneys. In a perfect world, where strong measures are in place to prevent ethical violations, an attorney may never need to resort to the corrective duty. However, reality suggests that a brief discussion of corrective measures is necessary.

1. Preventive Duty

Rules 5.1(a) and (b) expressly state that partners and supervisory lawyers must make “reasonable efforts” to ensure compliance with the SCRPC.⁵³ However, what “reasonable efforts” means for partners is somewhat different than what it means for supervisory lawyers. Rule 5.1(a) requires that a partner make “reasonable efforts” to ensure that the *law firm* has measures in place to effectuate compliance with the SCRPC by all lawyers in the firm.⁵⁴ On the other hand, Rule 5.1(b) requires that supervisory lawyers make “reasonable efforts” to ensure that the *supervised lawyer* complies with the SCRPC.⁵⁵

These “reasonable efforts” constitute the *preventive* duty of partners and supervisory lawyers.⁵⁶ The Rule suggests that partners and supervisory lawyers have an obligation to enact measures designed to prevent ethical violations of the SCRPC and that failing to implement such policies and procedures is a sanctionable breach of that duty.

In order to sanction an attorney under Rule 5.1(b), the state must prove by clear and convincing evidence the following:

- (1) The attorney in question was a lawyer with “direct supervisory authority” over the offending attorney;
- (2) The supervised attorney failed to conform to the Rules of Professional Conduct;
- and (3) The supervising attorney failed to make “reasonable efforts” in an attempt to ensure the supervised attorney followed the Rules of Professional Conduct.⁵⁷

In re Myers is illustrative of these elements. The supreme court found that the first two elements were easily satisfied. First, Myers, “as Solicitor, held supervisory authority over his Deputy Solicitor, Humphries,” and second, “the Panel . . . found

53. S.C. APP. CT. R. 407, R. 5.1(a) & (b).

54. *Id.* at R. 5.1(a) (emphasis added).

55. *Id.* at R. 5.1(b) (emphasis added).

56. Gillers, *supra* note 52, at 185.

57. *In re Anonymous*, 346 S.C. 177, 184–85, 552 S.E.2d 10, 13 (2001).

that Humphries violated the Rules of Professional Responsibility.”⁵⁸

The third element, whether Myers made “reasonable efforts” to ensure Humphries was in conformity with the SCRPC, required additional consideration.⁵⁹ The supreme court looked to the comments following SCRPC Rule 5.1, which state that in determining “reasonable efforts,” both a firm’s size and nature shall be considered.⁶⁰ Because the Solicitor’s office is a practice area where “intensely difficult ethical problems frequently arise,”⁶¹ a more elaborate procedure to ensure that supervised attorneys comply with the SCRPC is required.⁶² The simple fact that defense counsel was not advised about the eavesdropped conversation or the videotape of the conversation for two years indicates that the supervisory system was inadequate to secure the supervised attorney’s compliance with the SCRPC.⁶³ Consequently, Myers, as a supervisory lawyer, had not satisfied the “reasonable efforts” duty to prevent violations of the SCRPC since his supervised attorney acted unethically in the handling of a murder investigation.

A partner’s duty to prevent ethical violations is more extensive than a supervisory lawyer’s duty. Because partners are responsible for the *firm*, in addition to supervising and ensuring that all lawyers meet their ethical obligations, partners are accountable for ensuring that nonlawyer employees or agents of the firm conduct themselves in a manner that is “compatible with the professional obligations of the lawyer.”⁶⁴ Furthermore, partners have a duty to make sure that nonlawyer assistants and support staff are given reasonable “instruction and supervision concerning the ethical aspects of their employment.”⁶⁵

Whether enacting measures for an entire firm or for a supervised lawyer, policies and procedures must be in place to monitor ethical behavior. However, the failure of such policies and procedures to effectuate complete compliance with the SCRPC does not necessarily implicate responsibility on the part of the partner or supervisory lawyer. If “reasonable efforts” have been made and a violation of the SCRPC nevertheless occurred, then the corrective function is commenced.

58. *In re Myers*, 355 S.C. 1, 8, 584 S.E.2d 357, 360 (2003) (footnote omitted).

59. *Id.*

60. S.C. APP. CT. R. 407, R. 5.1 cmt.

61. *Id.*

62. *Myers*, 355 S.C. at 8, 584 S.E.2d at 361 (citing S.C. APP. CT. R. 407, R. 5.1 cmt.).

63. *Id.*

64. John M. Burman, *The Supervisory Responsibility of Lawyers*, WYO. LAW., Apr. 2001, at 13, 15 (quoting Wyo. Rules of Prof’l Conduct, R. 5.3(a)).

65. *Id.*; S.C. APP. CT. R. 407, R. 5.3 cmt.

2. *Corrective Duty*

The second obligation of partners and supervisory lawyers is a *corrective* duty imposed by SCRPC Rule 5.1(c) when an ethical violation is made known to the lawyer.⁶⁶ If a subordinate lawyer violates the SCRPC and a partner or supervisory lawyer learns of this misconduct “at a time when its consequences can be avoided or mitigated but fails to take remedial action,”⁶⁷ the partner or supervisory lawyer is personally liable for the subordinate’s behavior.⁶⁸ The important requirement for liability depends on the partner or supervisory lawyer’s discovery of the misconduct.⁶⁹ “Once the partner is on notice of another attorney’s misconduct, this subsection imposes a clear duty to take remedial measures to avoid or mitigate the consequences of that behavior.”⁷⁰ Failing to do so is itself a violation of the SCRPC and subjects the partner or supervisory lawyer to disciplinary sanctions.

In *In re Myers*, the supreme court held that Solicitor Myers was in violation of SCRPC Rule 5.1(c) because he failed to mitigate the damage caused by Deputy Solicitor Humphries’ misconduct.⁷¹ Once Myers became aware that his Deputy Solicitor and Sheriff’s Department personnel had overheard a privileged communication between Quattlebaum and his attorney (constituting knowledge or suspicion of misconduct), Myers had a duty to inform defense counsel (to avoid or mitigate the damages of this misconduct), either by directing Humphries to notify defense counsel or by calling “defense counsel himself.”⁷² However, Myers failed to do either, and as a result, Quattlebaum was convicted without the opportunity to pursue defenses that this blatant violation of his Sixth Amendment right to counsel made available to him.⁷³ This is exactly the type of misconduct Rule 5.1(c) seeks to punish.

The knowledge requirement does not suggest that a partner or supervisory attorney can shield himself from all liability simply because he does not know about the ethical violation.⁷⁴ On the contrary, “a complete lack of knowledge can lead to a finding of poor supervision if the subordinate’s violation is such that reasonable supervision would have discovered it.”⁷⁵ Thus, a supervisory attorney may be in

66. Gillers, *supra* note 52, at 185.

67. S.C. APP. CT. R. 407, R. 5.1(c)(2).

68. *In re Anonymous*, 346 S.C. 177, 183–84, 552 S.E.2d 10, 13 (2001).

69. *Id.* “Rule 5.1(c)’s liability is not vicarious liability because the obligation does not arise merely from the relationship between the attorneys. The supervising attorney’s ethical violation will be based on his . . . failure to mitigate [the underlying misconduct].” *Id.* at 184, 552 S.E.2d at 13.

70. *Id.* at 184, 552 S.E.2d at 13.

71. *In re Myers*, 355 S.C. 1, 10–11, 584 S.E.2d 357, 362 (2003).

72. *Id.* at 10, 584 S.E.2d at 362.

73. *Id.* at 10–11 & n.11, 584 S.E.2d at 362 & n.11.

74. See *In re Anonymous*, 346 S.C. 177, 187, 552 S.E.2d 10, 15 (2001).

75. *Id.*

violation of Rule 5.1(b) even though such conduct does not violate Rule 5.1(c).⁷⁶

As the Comment to Rule 5.1 suggests, the preventive duty and the corrective duty may slightly overlap. For example, in *In re Myers* the supreme court noted that the Solicitor's role in determining a criminal's fate subjects him to the highest ethical standards.⁷⁷ This elevated ethical obligation requires the implementation and management of a system designed to effectively "*supervise his deputies so that when he discovers that they may be violating a Rule of Professional Conduct, he can immediately ameliorate any prejudicial effect that the violation may have on the defense.*"⁷⁸ This suggests that satisfaction of the corrective duty may be dependent on the success of the preventive duty; if there is an adequate supervisory system in place, notice of any SCRPC violation will be recognized quickly enough to mitigate any damage.

Furthermore, failure to satisfy either of the two duties imposed by Rule 5.1 may have drastic and unintended effects. For example, had Myers satisfied his corrective duty as a supervisory lawyer by informing defense counsel of the eavesdropped conversation shortly after he received knowledge of it, Quattlebaum's conviction might not have been overturned.⁷⁹

3. Not Vicarious Liability

Vicarious liability is "[l]iability that a supervisory party . . . bears for the actionable conduct of a subordinate or associate . . . because of the relationship between the two parties."⁸⁰ However, reprimands under Rule 5.1 do not impose vicarious liability.

Rule 5.1(a) establishes that partners in a law firm are responsible for ensuring that all members of the firm comply with the SCRPC.⁸¹ This does not impose vicarious liability on partners for the unethical behavior of an attorney in their firm.⁸² Rather, it is an obligation imposed on every partner to enact measures that will assist all attorneys in the firm in meeting their ethical responsibilities.⁸³ If reasonable measures have not been established for the firm and an ethical violation occurs, a violation separate from the rule the subordinate attorney has violated

76. S.C. APP. CT. R. 407, R. 5.1 cmt. ("Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.")

77. *Myers*, 355 S.C. at 11, 584 S.E.2d at 362.

78. *Id.* (emphasis added).

79. *State v. Quattlebaum*, 338 S.C. 441, 444 & 446-49, 527 S.E.2d 105, 106 & 107-09 (2000).

80. BLACK'S LAW DICTIONARY 927 (7th ed. 1999).

81. S.C. APP. CT. R. 407, R. 5.1(a).

82. *In re Anonymous*, 346 S.C. 177, 186, 552 S.E.2d 10, 14 (2001).

83. *Id.*

occurs: “[t]he failure to [enact reasonable measures] is, itself, misconduct.”⁸⁴

The supreme court reprimanded Solicitor Myers for violating Rules 5.1(b) and (c) of the SCRPC because he failed to adequately supervise Deputy Solicitor Humphries. Humphries admitted that his behavior in the Quattlebaum matter violated Rule 5 of the South Carolina Rules of Criminal Procedure and numerous SCRPC provisions.⁸⁵ More particularly, the supreme court found Humphries was in violation of SCRPC Rule 3.4(c), Rule 3.4(d), Rule 8.4(a) and Rule 8.4(e).⁸⁶ These violations involved Solicitor Myers under Rule 5.1.

Myers was found to be in violation of the SCRPC, not for the misconduct of Humphries in the Quattlebaum matter, but for his own failure to comply with Rules 5.1(b) and (c).⁸⁷ For his failure to supervise Humphries, Myers was sanctioned with a publicly imposed private reprimand.⁸⁸ The imposition of this sanction is not vicarious liability.⁸⁹ Myers was not held responsible for the misconduct of another; rather, he was held responsible for his own misconduct. The supreme court noted that Myers’ “knowledge of this severe intrusion into the attorney-client conversation, coupled with his failure to make sure the defense knew about it, [was] the *only* reason why he should be sanctioned.”⁹⁰

Following this decision, many attorneys, especially solicitors and public sector attorneys, should reexamine the measures they have in place to ensure compliance with the SCRPC. In the aftermath of *In re Myers*, the supreme court has brought a heightened awareness of Rule 5.1 to all attorneys, both private and public. The remainder of this Note evaluates this decision’s implications for the practice of law in South Carolina.

III. IMPLICATION OF RULE 5.1 IN PRACTICE

In a profession where ethics is held in the highest esteem, all members of the

84. Burman, *supra* note 64, at 13.

85. *In re Humphries*, 354 S.C. 567, 572–74, 582 S.E.2d 728, 730–31 (2003).

86. *Id.* at 573, 582 S.E.2d at 730–31.

87. *In re Myers*, 355 S.C. 1, 14, 584 S.E.2d 357, 363–64 (2003).

88. *Id.* at 15, 584 S.E.2d at 364.

The vast majority of the misconduct relating to the failure to supervise was committed before the Rules of Lawyer Disciplinary Enforcement became effective on January 1, 1997. Under the former Rule on Disciplinary Procedure, the appropriate sanction would have been a private reprimand, and we find that is the appropriate sanction in this case.

Id. at 15, 584 S.E.2d at 364; *see also Anonymous*, 346 S.C. 177, 552 S.E.2d 10 (assessing a private reprimand of attorney found in violation of the SCRPC for failing to supervise subordinate lawyer).

89. *See, e.g., LIPSCOMB & WALL, supra* note 17, § 78 (“Vicarious liability is not the issue when a supervised attorney violates the Rules of Prof. Conduct by failing to satisfy the ethical responsibilities of a partner or supervisory lawyer in relation to the other supervised attorney’s misconduct.”).

90. *Myers*, 355 S.C. at 11 n.11, 584 S.E.2d at 362 n.11 (emphasis added).

legal community must do their share to ensure compliance with ethical standards. Moreover, in order to prevent another overturned conviction as a result of a failure to supervise, it is important to reiterate how and to whom Rule 5.1 applies. Additionally, it is important to evaluate at what point an attorney, in either a partner or a supervisory capacity, crosses the line from reasonable effort into sanctionable activity.

A. To Whom Does Rule 5.1 Apply?

The South Carolina Rules of Professional Conduct defines the term “firm” or “law firm” as “a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization.”⁹¹ However, the comments to Rule 5.1 demonstrate that this rule applies outside the private sector:

Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of *a firm or legal department of a government agency*. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; *lawyers having supervisory authority in the law department of an enterprise or government agency*; and lawyers who have intermediate managerial responsibilities in a firm.⁹²

Even though the comments to the SCRPC were designed to give courts interpretative guidance,⁹³ in *In re Myers*, the supreme court treated the comments as authoritatively as they did the Rules themselves.⁹⁴ As a result, the supreme court made it clear that “[the] ‘duty to supervise’ also applies to public attorneys and to Solicitor’s offices.”⁹⁵

Thus, the Rule must be examined and applied to both the private and public arena. Under Rule 5.1, lawyers are separated into three categories: (1) partners; (2) supervisory lawyers; and (3) all lawyers.⁹⁶

Partner is defined as “a member of a partnership and a shareholder in a law firm organized as a professional corporation” under the SCRPC.⁹⁷ Supervisory lawyers

91. S.C. APP. CT. R. 407, Terminology.

92. *Id.* at R. 5.1 cmt. (emphasis added).

93. WILCOX & CRYSTAL, *supra* note 18, at 7.

94. *Myers*, 355 S.C. at 8–12, 584 S.E.2d at 360–62.

95. *Id.* at 14–15, 584 S.E.2d at 364.

96. See Burman, *supra* note 64, at 13 for a similar classification of lawyers under Wyoming’s Rule 5.1.

97. S.C. APP. CT. R. 407, Terminology.

are defined in Rule 5.1(b) as “lawyer[s] having *direct supervisory authority over another lawyer*.”⁹⁸ But what “direct supervisory authority” means is not clear from the text of the Rule. The comments, however, state that “[w]hether a lawyer has such supervisory authority in particular circumstances is a question of fact.”⁹⁹ Moreover, the supreme court has recognized that “Rule 5.1 does not require that an attorney be the day-to-day supervisor of the attorney committing the misconduct to create liability. The key to liability is whether there was *authority* over the violating attorney.”¹⁰⁰

In *In re Myers*, the supreme court ruled that the duty to supervise also applies to lawyers in government agencies. Although the text of the Rule does not specifically mention government agencies, they are addressed in the comments. Thus, the supreme court in *In re Myers*, based on the comments, held that SCRPC “Rule 5.1(a) applies to government agencies, as well as law firms.”¹⁰¹

The third category under Rule 5.1 addresses all lawyers. Rule 5.1(c)(1) indicates that a lawyer can be held responsible for the ethical violations of another lawyer if the lawyer (1) orders the misconduct or (2) with knowledge of the specific conduct, ratifies the misconduct.¹⁰² Most commentators and the supreme court suggest that this rule applies only to supervising attorneys.¹⁰³ However, the comment, when read in conjunction with SCRPC Rule 8.4(a),¹⁰⁴ seems to indicate that this Rule applies to *any* lawyer who orders or ratifies the misconduct of another, regardless of whether he or she is a partner or in a supervisory capacity.¹⁰⁵

Although Rule 5.1(c)(1) falls under the general heading “Responsibilities of a Partner or Supervisory Lawyer,” the clear language of the rule states that “*a lawyer*”

98. S.C. APP. CT. R. 407, R. 5.1(b) (emphasis added).

99. *Id.* at R. 5.1 cmt.

100. *In re Anonymous*, 346 S.C. 177, 185, 552 S.E.2d 10, 13 (2001) (citing *In re Moore*, 329 S.C. 294, 494 S.E.2d 804 (1997)).

101. *In re Myers*, 355 S.C. 1, 12, 584 S.E.2d 357, 362 (2003) (footnote omitted).

102. S.C. APP. CT. R. 407, R. 5.1(c)(1).

103. A partner or supervisory lawyer is responsible for the misconduct of a subordinate lawyer, if the *partner or supervisory lawyer* (1) orders the misconduct, (2) with knowledge of the misconduct ratifies the actions of the subordinate lawyer, or (3) “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

WILCOX & CRYSTAL, *supra* note 18, at 198 (emphasis added). The supreme court similarly held that “under Rule 5.1(c), attorneys will be responsible for another lawyer’s violation of the Rules of Professional Conduct if they ratify or fail to mitigate known misconduct *committed by an attorney they supervise*.” *Anonymous*, 346 S.C. at 183, 552 S.E.2d at 12 (emphasis added).

104. S.C. APP. CT. R. 407, R. 8.4(a) (“It is professional misconduct for a lawyer to: (a) [V]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . .”).

105. S.C. APP. CT. R. 407, R. 5.1(c) & R. 5.1 cmt. (“Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).”)

is responsible for the misconduct of another lawyer.¹⁰⁶ This point is further illustrated by the express mention of partner and supervisory lawyer in Rule 5.1(c)(2). Had the drafters intended Rule 5.1(c)(1) to apply only to partners and supervisory lawyers, such language would have been used as was the case in Rule 5.1(c)(2). Because the “text of each Rule is authoritative,”¹⁰⁷ it seems that *any* lawyer who orders or ratifies another’s misconduct will be personally responsible.

The ABA has adopted this position. “[U]nder [Model] Rule 5.1(c) any lawyer in the firm or organization may become subject to discipline for the unethical conduct of other attorneys under certain circumstances. Specifically, the lawyer will be held responsible for such conduct . . . if the lawyer ordered or ratified the conduct”¹⁰⁸ There is no requirement that an attorney be a partner or supervisory lawyer in order to face personal responsibility.

Lawyers need to be aware of this provision and its potential for imposing personal responsibility. Although all lawyers are constrained by SCRPC Rule 8.4(a), it is advantageous to know of any additional requirements the SCRPC may place on lawyers’ conduct, especially ones that are not clearly stated in the Rules.

It is important to note that a person may fall within more than one category at a time. As time passes, a particular lawyer’s role may likewise change. It is imperative to know the qualifications and duties of each role.

B. Reasonable Measures

Both Rules 5.1(a) and (b) (preventive duty) and Rule 5.1(c) (corrective duty) impose a reasonableness requirement on the actions of partners and supervisory lawyers. In order to satisfy the requirements of the corrective duty, the same reasonable remedial action standard must be met whether it is applied to the actions of the partner or to those of the supervisory lawyer. The comments to Rule 5.1 suggest the following: “Appropriate remedial action by a partner would depend on the immediacy of the partner’s involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.”¹⁰⁹ However, satisfaction of the “reasonable efforts” standard of the preventive duty may vary from partner to supervisory lawyer. The remainder of this Note focuses on satisfying this requirement.

In order to determine whether a partner or a supervisory lawyer has complied with Rule 5.1(a) or (b), it is necessary to define “reasonable efforts.” “Reasonable

106. *Id.* at R. 5.1(c) (emphasis added).

107. *Id.* at Scope.

108. LAWYERS’ MANUAL ON PROF’L CONDUCT, *supra* note 13, at 91:104.

109. S.C. APP. CT. R. 407, R. 5.1 cmt.

efforts” is not a concrete standard. Reasonableness depends on a case-by-case analysis of the facts and the nature of the law firm.¹¹⁰ As the comment to Rule 5.1 suggests, “reasonable efforts” means different methods for different firms. A small firm is not expected to implement a policy similar to that imposed by a large firm, and a large firm cannot meet this obligation simply by enacting a procedure acceptable for a small firm. “In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary.”¹¹¹

Perhaps an easier way to understand what constitutes “reasonable efforts” is to look at what constitutes a violation of the rule. A Maryland court held that a lawyer assigning “too many cases to too few lawyers at the last minute, with the result that subordinate lawyers would show up for trial knowing little or nothing about the case . . . ‘does not comport with the requirements of Rule 5.1’”¹¹² In *In re Moore*, a lawyer who turned over all discovery matters to an associate still was responsible for ensuring that the associate appropriately responded to discovery requests.¹¹³ In *Moore v. State Bar of California*,¹¹⁴ the court “suspended a lawyer who completely failed to supervise his associate’s work, while assuring the client that his pleadings were being properly filed.”¹¹⁵

“Reasonable efforts” require some affirmative action on the part of the partner or the supervisory lawyer. Availability alone is not sufficient. In *In re Ritgers*,¹¹⁶ the court noted that “when lawyers take on the significant burdens of overseeing the work of other lawyers, more is required than that the supervisor simply be ‘available’” to subordinate lawyers.¹¹⁷

C. Suggestions for Ensuring Compliance with Rule 5.1

Many policies and procedures would satisfy the “reasonable efforts” standard of Rule 5.1. The following suggestions have been compiled from various commentators.

110. See Douglas R. Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W. VA. L. REV. 449, 455–56 (2003); see also S.C. APP. CT. 407, R. 5.1 cmt.

111. *Id.* at R. 5.1 cmt.

112. LAWYERS’ MANUAL ON PROF’L CONDUCT, *supra* note 13, at 91:107 (quoting Attorney Grievance Comm’n v. Ficker, 706 A.2d 1045 (Md. 1998)).

113. *In re Moore*, 329 S.C. 294, 298, 494 S.E.2d 804, 806 (1997).

114. 396 P.2d 577 (Cal. 1964).

115. Gillers, *supra* note 52, at 185.

116. 556 A.2d 1201 (N.J. 1989).

117. *Id.* at 1203 (citations omitted).

1. *Partners*

Many methods have been proposed that assist in meeting the reasonableness standard articulated in Rule 5.1(a). Because partners are responsible for ensuring that all lawyers within the firm conform to the SCRPC, one commentator has suggested that a partner's "scope of the obligation is both educational and operational."¹¹⁸ "The firm should . . . have 'measures' providing for reviews of the work ('competency') of associates and other partners," and "should take 'measures' to prevent ethical breaches, including reviews of one another's work, fee agreements, 'conflict-detection' protocols, and calendar reviews (docket control systems)."¹¹⁹

Other commentators have recommended similar measures to eliminate client conflicts. "Most importantly, a law firm must take steps to protect clients' or former clients' expectations of loyalty and confidentiality."¹²⁰ Thus, in large firms a system such as a conflict search database would assist junior lawyers in meeting this ethical obligation under the SCRPC.¹²¹

Another suggested method to ensure SCRPC compliance is to "provide a basic substantive ethics review upon [the new lawyer's] entry into the firm. Make sure they know about conflicts and how to do a thorough conflicts check, how to be forthcoming in discovery and how to act in litigation."¹²² Partners should not assume that new associates have learned these matters in law school.¹²³

An additional proposal would be to increase the senior-to-junior ratio by assigning more senior staff to the junior staff.¹²⁴ More people monitoring the new associates would ease the burden for all involved.

Another approach is designating a partner or committee to deal with ethical questions as they develop.¹²⁵ Small firms may have difficulty establishing an ethics committee, but there is little reason why a small firm cannot delegate the authority to a senior lawyer to handle ethical questions when they arise.¹²⁶

Whether a firm chooses to form an ethics committee or to delegate responsibility to an ethics advisor, the responsibilities should be similar. First, the ethics advisor or committee should distribute the advance sheets and, when an

118. Louis Parley, *Managing on the Straight & Narrow: Sidestepping Ethical Sinkholes in Your Day-to-Day Practice*, FAMILY ADVOCATE, Winter, 2000 at 33, 35.

119. *Id.*

120. Burman, *supra* note 64, at 15.

121. *See id.*; WILCOX & CRYSTAL, *supra* note 18, at 198.

122. Jill C. Rothstein, *Preventative Maintenance: A 14-Point Ethics Inspection*, S.C. LAW., March/April, 2002 at 35, 36.

123. *See id.*

124. *Id.*

125. *See id.*

126. *Id.*

important ethics opinion like *In re Myers* is handed down, bring it to the attention of all lawyers.¹²⁷ The advisor or committee should prepare and disseminate a monthly in-house newsletter to all lawyers or operate an electronic bulletin board addressing any developments in the law of ethics.¹²⁸ Finally, the advisor or committee should keep all lawyers abreast of upcoming seminars and continuing legal education courses that address ethics. Similarly, the firm itself should “encourage partners and associates to attend continuing legal education seminars addressing ethics issues.”¹²⁹

Perhaps the most significant purpose of the ethics advisor or committee is to ensure that new associates have access to a go-to person when they encounter an ethical dilemma or when they receive instructions from a senior lawyer and are uncomfortable with their assignment.¹³⁰ In the interest of resources, it is perfectly acceptable if the ethics advisor is the go-to person. As long as new associates have an impartial third party (or committee) available to handle their ethical concerns, it is likely the “reasonableness” standard of Rule 5.1(a) is satisfied.¹³¹

2. Supervisory Lawyers

Most of the recommendations for reasonable methods, policies, and procedures with regard to partners in a law firm can also be applied to supervisory lawyers if feasible. However, some additional suggestions have been posed for the supervisory context.

In order to ensure a supervised lawyer is in compliance with the SCRPC, one commentator suggests having “a close enough working relationship between seniors and juniors that the monitoring takes care of itself without a system needing to be put into place.”¹³²

Another monitoring device that would assist subordinate lawyers is the establishment of “a systematic, organized routine for periodic review” of a new

127. *Id.*

128. See Hon. Henry W. Saad, *Practical Ways to Improve the Ethical Behavior of Lawyers*, 78 MICH. B. J. 982, 983 (1999).

129. Parley, *supra* note 118, at 35.

130. Rothstein, *supra* note 122, at 36.

131. See generally CHARLOTTE MOSES FISHMAN & DAVID M. RUBIN, *Conflicts of Interest: Prevention and Resolution*, in STAYING OUT OF TROUBLE: WHAT EVERY ATTORNEY MUST KNOW ABOUT ETHICS, at 419, 422 (PLI N.Y. Practice Skills Course, Handbook Series No. F.-127, 2002).

Ethics committees provide needed expertise and guidance to help lawyers avoid unintentional violations of ethical codes and meet their obligations under the ethical codes . . . [c]ourts and disciplinary committees are more likely to hold supervisors liable for subordinates where there are no systems in place, such as an ethics committee, to detect conflicts of interest.

Id.

132. Rothstein, *supra* note 122, at 36.

associate's files.¹³³ If each lawyer has a mentor who reviews the subordinate lawyer's work for "substantive, procedural, and ethical integrity," the system invites subordinate attorneys to seek help.¹³⁴

A Maryland court has also put forth the idea that supervisory lawyers, particularly if they have several lawyers under their watch, should implement a calendaring system to organize specific tasks and warn of encroaching deadlines.¹³⁵

By creating a working atmosphere that invites questions regarding ethical issues, subordinates are more likely to seek advice before acting unethically. Thus, the supervisory lawyer's risk of being held personally responsible for the conduct of another lawyer drastically decreases. "[T]he supervision of attorneys by other attorneys in their firm is one of the most effective methods of preventing attorney misconduct."¹³⁶

IV. CONCLUSION

South Carolina, in *In re Myers*, has made it clear that the duty to supervise under Rule 5.1 applies to the Solicitor's office. Because the Solicitor has a vital role in the criminal justice system, his behavior is subject to heightened scrutiny. The state supreme court used this elevated standard to find Solicitor Myers in violation of the SCRPC, and even went so far as to indicate that Rule 5.1 also applies to public sector attorneys. However, this ruling should come as no great surprise. The comments to Rule 5.1 expressly state that such application was intended.

As the Preamble to the SCRPC states, "[e]very lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."¹³⁷

The ethical obligations of one truly implicate the ethical obligations of all. One of the most effective methods for ensuring compliance with the SCRPC is the imposition of duties on partners and supervisory lawyers. As such, it is imperative that partners and supervisory lawyers do what is required of them under SCRPC Rule 5.1 to prevent ethical violations and, upon notice, correct such violations. Significantly, it is now clear in South Carolina that this duty is imposed equally on both private and public sector attorneys. Partners and supervisory lawyers are

133. *In re Anonymous*, 346 S.C. 177, 186–87, 552 S.E.2d 10, 14 (2001) (citing *In re Barry*, 447 A.2d 923, 926 (N.J. 1982) (Clifford, J., dissenting)).

134. Saad, *supra* note 128, at 983.

135. LAWYERS' MANUAL ON PROF'L CONDUCT, *supra* note 13, at 91:107 (citing Attorney Grievance Comm'n v. Ficker, 706 A.2d 1045 (Md. 1998)).

136. *Anonymous*, 346 S.C. at 187, 552 S.E.2d at 14.

137. S.C. APP. CT. R. 407, Preamble.

charged with the responsibility of making reasonable efforts to ensure that all supervisory and subordinate lawyers comply with their ethical obligations. Satisfaction of these responsibilities greatly influences the ethical dimensions of the profession.

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